

No.

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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In re Speaker of the House Ben Toma and Senate President Warren Petersen.

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SPEAKER OF THE HOUSE BEN TOMA, in his official capacity and  
SENATE PRESIDENT WARREN PETERSEN in his official capacity,  
*Intervenor-Defendants-Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,  
*Respondent,*

MI FAMILIA VOTA, VOTO LATINO, LIVING UNITED FOR CHANGE IN ARIZONA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, ARIZONA STUDENTS' ASSOCIATION, ADRC ACTION, INTER TRIBAL COUNCIL OF ARIZONA INCORPORATED, SAN CARLOS APACHE TRIBE, ARIZONA COALITION FOR CHANGE, UNITED STATES OF AMERICA, PODER LATINX, CHICANOS POR LA CAUSA, CHICANOS POR LA CAUSA ACTION FUND, DEMOCRATIC NATIONAL COMMITTEE, ARIZONA DEMOCRATIC PARTY, ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION, PROMISE ARIZONA, SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, TOHONO O'ODHAM NATION, GILA RIVER INDIAN COMMUNITY, KEANU STEVENS, ALANNA SIQUIEROS, LADONNA JACKET, ADRIAN FONTES, in his Official Capacity as Arizona Secretary of State, LARRY NOBLE, APACHE COUNTY RECORDER, In his Official Capacity, DAVID W. STEVENS, COCHISE COUNTY RECORDER, In his Official Capacity, PATTY HANSEN, COCONINO COUNTY RECORDER, In Her Official Capacity, SADIE JO BINGHAM, GILA COUNTY RECORDER, In Her Official Capacity, SHARIE MILHEIRO, GREENLEE COUNTY RECORDER, IN HER OFFICIAL CAPACITY, RICHARD GARCIA, LA PAZ COUNTY RECORDER, IN HIS OFFICIAL CAPACITY, STEPHEN RICHER, MARICOPA COUNTY RECORDER, IN HIS OFFICIAL CAPACITY, KRISTI BLAIR, MOHAVE COUNTY RECORDER, IN HER OFFICIAL CAPACITY,

MICHAEL SAMPLE, NAVAJO COUNTY RECORDER, IN HIS OFFICIAL CAPACITY, GABRIELLA CAZARES-KELLY, PIMA COUNTY RECORDER, IN HER OFFICIAL CAPACITY, SUZANNA SAINZ, SANTA CRUZ COUNTY RECORDER, IN HER OFFICIAL CAPACITY, RICHARD COLWELL, YUMA COUNTY RECORDER, IN HIS OFFICIAL CAPACITY, MICHELLE BURCHILL, YAVAPAI COUNTY RECORDER, IN HER OFFICIAL CAPACITY, DANA LEWIS, KRIS MAYES, IN HER OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, POLLY MERRIMAN, GRAHAM COUNTY RECORDER, IN HER OFFICIAL CAPACITY, STATE OF ARIZONA, JENNIFER TOTH, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF TRANSPORTATION,

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*Real Parties in Interest.*

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On Petition for a Writ of Mandamus to the United States District Court, District of  
Arizona-Phoenix  
Case No. 2:22-CV-00509-SRB

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**EMERGENCY MOTION FOR STAY OF DISCOVERY ORDER**  
**(RULING REQUESTED BY OCTOBER 10, 2023)**

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Pursuant to Rule 8(a)(1)(A) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3, Intervenor-Defendants Speaker of the House Ben Toma and Senate President Warren Petersen (collectively, the “Legislators”) respectfully ask the Court to issue an emergency stay of the district court’s September 14, 2023 Order in Case 2:22-cv-00509-SRB (Doc. 535), which order wrongly compels the production of communications protected by the legislative privilege and also authorizes Plaintiffs to depose the Legislators about their personal involvement in the legislative process leading to the passage of two Arizona laws, H.B. 2243 and H.B. 2492 (the “Voting Laws”). A copy of that order is attached as Exhibit 1.

Although the Legislators moved the district court to stay that order while they sought a Writ of Mandamus from this Court, the district court, in an order issued on September 26, 2023, denied that motion (Doc. 548). A copy of that order is attached as Exhibit 2.

This motion is filed contemporaneously with, and relies on, the Legislators’ Petition for Writ of Mandamus (the “Petition”), which asks the Court to reverse the district court’s discovery order with respect to the compelled discovery and issue a protective order barring the requested discovery. As required by FRAP 8(a)(2)(C), the Legislators are giving notice of this motion to all parties by electronic distribution of the motion through Pacer. In addition, the Legislators have emailed a copy of this motion to counsel for all parties.

A stay pending review of the September 14 Order by this Court should be entered because, among other reasons, the district court clearly erred in finding a waiver of the legislative privilege, and—other than as readily shown in the already-publicly available records—Toma and Petersen’s personal involvement in the legislative process leading to the Voting Laws, and their motives for voting in favor of those laws, are not relevant to any issue in the case.

In considering whether to grant a stay pending appeal, “a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation omitted).

The Legislators’ contemporaneously filed Petition explains why they are likely to succeed on the merits, and we refer the Court to that document as to the first factor. In brief, however, the district court found the Legislators had waived the legislative privilege merely by intervening in the lawsuit and generally denying Plaintiffs’ claims, even though the Legislators had a statutory right to intervene under A.R.S. § 12-1841 and they intervened in their official capacities purely to make legal arguments defending the constitutionality of the Voting Laws based on

the evidentiary record. The Legislators have not and do not intend to offer testimony or other evidence regarding the legislative process of the Voting Laws.

In addition, regardless of privilege issues, long-standing precedent bars the deposition of legislators to determine their individual motives for supporting legislation. *See, e.g. Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) (“we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in extraordinary circumstances”) (internal quotation omitted).

As to the second factor, irreparable harm, unless the Court issues an immediate stay the Legislators will quickly find themselves between the mythical Scylla and Charybdis: they’ll either need to submit to improper depositions within the next few weeks, or refuse to do so and expose themselves to potential sanctions and contempt charges.<sup>1</sup> Either choice brings serious consequences that can’t be corrected.

As to the third factor, issuance of the stay while the Court considers the Petition will not injure the other parties. That’s because the discovery is improper in the first place, and in the second place, we anticipate that—based on prior decisions

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<sup>1</sup> Pursuant to the district court’s order, the Legislators have provisionally produced the withheld privileged documents to opposing counsel with an attorneys’ eyes only designation, but the relief sought in the Legislators’ petition for writ of mandamus would include the return of those provisionally produced materials.

of this Court—the Court will be able to resolve the dispute quickly. See, for example, *City of Las Vegas v. Foley*, 908 F.3d 1175 (9th Cir. 1984) (granting mandamus relief and directing the district court to grant a protective order barring deposing legislators about their subjective motivations for approving a zoning ordinance); *Lee*, 908 F.3d at 1187-88 (holding that the legislative privilege barred the depositions of officials involved in Los Angeles’ redistricting process).

The fourth factor, the public interest, also heavily favors the Legislators. To begin with, the legislative privilege helps preserve “[o]pen dialogue between lawmakers and their staff,” and the failure to preserve that privilege will thus chill legislative debate. See, e.g. *Citizens Union of City of NY. V. Att’y Gen. of N.Y.*, 269 F. Supp. 3d 124, 170 (S.D.N.Y. 2017). Such chilling would, in turn, impede the Legislators’ ability to discharge their duties with “firmness and success,” without “concern of adverse consequences outside the ballot box.” *Lee*, 908 F.3d at 1186-87 (citation omitted). Requiring legislators to “produce communications touching upon the legislative process would constitute the precise sort of interference that the state legislative privilege was designed to prevent.” *Mi Familia Vota v. Hobbs*, No. CV-21-01423-PHX-DWL, 2023 WL 4595824, at \*12 (D. Ariz. July 18, 2023) (citations omitted).

Moreover, the Supreme Court has “repeatedly stressed that ‘judicial inquiries into legislative or executive motivation represent a substantial intrusion’ such that

calling a decision maker as a witness ‘is therefore usually to be avoided.’” *Lee*, 908 F.3d at 1188 (quoting *Arlington Heights*, 429 U.S. at 268 n.18).

### **CONCLUSION**

For all the reasons discussed above and in the Legislators’ related Petition for Writ of Mandamus, the Legislators ask the Court to issue an immediate emergency stay of the district court’s discovery order (Doc. 535). In light of the tight pre-trial deadlines in this case, we ask the Court to consider and act upon this motion by Tuesday, October 10, 2023.

As explained in the Petition, although the district court’s discovery order did not give the Legislators a specific deadline for producing the documents or submitting to the depositions, Plaintiffs have demanded that the documents be produced by September 29, 2023, have noticed depositions of Toma and Petersen for October 5 and 6, and have threatened to seek sanctions if the Legislators fail to comply. In recent discussions, Plaintiffs have suggested they would be willing to consider pushing the depositions of Toma and Petersen back until the week before the joint pretrial statement deadline.

The joint pretrial statement is due on Monday, October 16, 2023. The Monday before that, October 9, is Columbus Day, a federal holiday. We therefore ask the Court to rule on this motion by Tuesday, October 10, 2023.

Dated: September 29, 2023

**GALLAGHER & KENNEDY, P.A.**

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## **CERTIFICATE OF COMPLIANCE**

This motion complies with the length requirements of Fed. R. App. P. 27(d), excluding the parts of the document exempted by Fed. R. App. P. 21(a)(2)(C) and Fed. R. App. P. 32(f) because it contains 1,158 words and it does not exceed 20 pages pursuant to 9th Circuit Rule 27-1(1)(d).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: September 29, 2023

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed this motion with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 29, 2023. I also certify that certain participants in the case are registered CM/ECF users and that service will be accomplished by the appellate. CM/ECF system.

In addition, a copy of the motion has been emailed to counsel.

Dated: September 29, 2023

GALLAGHER & KENNEDY, P.A.

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## **CIRCUIT RULE 27-3 CERTIFICATE FOR EMERGENCY MOTION**

**9th Circuit Case Number:** [Not yet assigned]

**Case Name:** In re Speaker of the House Ben Toma and Senate President Warren Petersen.

**Relief is needed no later than:** October 10, 2023

**The following will happen if relief is not granted within the requested time:**

Unless relief is granted within the requested time, the movants, Arizona Speaker of the House Ben Toma and Arizona Senate President Warren Petersen, may be forced to choose between subjecting themselves to improper depositions regarding their personal involvement in the passage of two state laws, and their motives in voting in favor of the same, or being sanctioned or found in contempt for disobeying the district court's orders.

**I could not have filed this motion earlier because:** The district court denied the Petitioner's request for stay on September 26, 2023. On September 27, 2023, Plaintiffs' counsel issued notices of deposition setting depositions of Speaker Toma and President Petersen for October 5 and October 6. Undersigned counsel reached out to Plaintiffs' counsel regarding staying the depositions pending a ruling on the petition for writ of mandamus, Plaintiffs would not agree to a stay.

**I requested this relief in the district court:** Yes, a request for stay was filed with the district court, which as denied on September 26, 2023.

**I notified 9th Circuit court staff via voicemail or email about the filing of this motion:** Yes

**Parties' Positions:**

In addition to the notice provided within the Legislators' motion to stay before the district court, Undersigned counsel notified all counsel and any unrepresented party of the Legislator's intent to file this motion on September 28, 2023 by email. Copies of this motion and the petition for writ of mandamus will be emailed to all counsel by email on September 29, 2023.

- Non-U.S. Plaintiffs oppose the request for stay.
- The United States takes no position on the Speaker and President's petition and motion to stay at this time.
- The State and Attorney General agree that the Speaker and President's petition raises an important and time-sensitive issue regarding legislative privilege but otherwise take no position on the motion to stay.
- The Secretary of State takes no position on the relief requested in the motion to stay, provided that the relief sought will not delay the currently scheduled

trial. The Secretary of State opposes any change to the currently scheduled trial dates.

- Intervenor-Defendant Republic National Committee does not take a position on the motion to stay at this time.

**Name and contact information for each counsel/party notified:**

*See* attached list starting on the following page.

I declare under penalty of perjury that the foregoing is true.

Dated: September 29, 2023

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